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IN THE

Supreme Court of the United States

OCTOBER TERM, 1958

No. 813

WILLIAM P. ROGERS, Attorney General of the United States, as Successor to the Alien Property Custodian

vs.

SCHERING CORPORATION, a corporation of the State of New Jersey,

Appellant,

HEXAGON LABORATORIES, INC., a corporation of the State of New York,

Intervenor-Petitioner.

PETITION OF HEXAGON LABORATORIES, INC. FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

ALLAN L. TUMARKIN,
Attorney for Intervenor-Petitioner,
9 Clinton Street,
Newark, New Jersey.

MONTROSE H. MASSLER,
THEODORE R. KUPFERMAN,
36 West 44th Street,
New York 36, N. Y.
of Counsel.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1958

No. .....

WILLIAM P. ROGERS, Attorney General of the United States, as Successor to the Alien Property Custodian

vs.

SCHERING CORPORATION, a corporation of the State of New Jersey,

Appellant,

HEXAGON LABORATORIES, INC., a corporation of the State of New York,

Intervenor-Petitioner.

PETITION OF HEXAGON LABORATORIES, INC. FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

Hexagon Laboratories, Inc. (hereinafter "Hexagon"), prays that a writ of certiorari issue to review the order of the United States Court of Appeals for the Third Circuit, entered in the above case on January 8, 1959.

OPINIONS BELOW

The opinion of the Court of Appeals on which it entered its order of the same date with respect to which Hexagon here seeks certiorari is dated January 8, 1959. It holds that the order of the district court, which vacates the award of arbitrators and thus requires a new arbitration, is final and, therefore, appealable by Schering. The opinion is reported at 262 F. 2d 180, and is printed in Appendix B.

The opinion of the district court on which was entered the order from which Schering seeks to appeal to the Court of Appeals is dated August 11, 1958. It grants Hexagon's motion to vacate the award of arbitrators and thus requires a new arbitration. The opinion is reported at 165 F. Supp. 295.

The opinion of the district court on Schering's motion for construction of the final decree entered in this action is dated November 21, 1956. It holds that Hexagon is a qualified applicant for a license under the Agreement made as of January 1, 1952, between Schering and the Attorney General (hereinafter the "Agreement"), and therefore Schering is required to negotiate with, make offers to and issue licenses to Hexagon. The opinion is reported at 146 F. Supp. 106.

The opinion of the district court on which the final decree was entered herein is dated March 21, 1955. It holds that the Agreement is valid and enforceable according to its terms. It is reported at 129 F. Supp. 879, aff'd CCA 3, 228 F. 2d 624, cert. den. 351 U. S. 954.

JURISDICTION

The order of the Court of Appeals for the Third Circuit is dated and was entered on January 8, 1959. The jurisdiction of this court is invoked under 28 U. S. C. 1254 (1).

QUESTIONS PRESENTED

Is the order of the district court granting Hexagon's motion to intervene and on such intervention vacating the award of arbitrators (on the ground that one of the arbitrators is disqualified to act) and denying Schering's motion to enter judgment on said award, thus requiring a new arbitration, a final order from which the defendant, Schering, may appeal to the Court of Appeals?

STATUTES INVOLVED

28 U. S. C. 1291 is set forth in Appendix A.

STATEMENT OF FACTS

The facts might well be stated in the language of the opinion of the Court of Appeals for the Third Circuit, as follows (Appendix B, *infra*, pp. 2b, 3b):

"The stock of Schering, owned by German interests, was taken over by the Alien Property Custodian pursuant to the Trading with the Enemy Act. In 1952 the Schering stock was sold to the public, after an agreement had been entered into by the corporation with the Attorney General, as successor to the Alien Property Custodian, whereby,

inter alia, it was agreed that certain patents owned by Schering were to be licensed by it to qualified applicants on a non-exclusive basis at a reasonable royalty to be arrived at by negotiation or, if negotiation failed, by arbitration under the rules of the American Arbitration Association.

"An action was brought by the Attorney General as plaintiff to enjoin alleged violation of the agreement and for a declaratory judgment that the agreement was valid. The defendant, Schering Corporation, counterclaimed for rescission of the agreement. On July 8, 1955 the district court gave judgment for the plaintiff. 129 F. Supp. 879. The judgment was affirmed by this court on appeal.[1] 228 F. 2d 624, cert. den. 351 U. S. 954.

"On July 6, 1956 Hexagon applied to Schering for a license under Schering's Patent No. 2,567,245 to manufacture and sell an anti-histamine known as chlorprophenpyradimine maleate. The parties were unable to agree on the amount of royalty and on September 8, 1956 Hexagon demanded arbitration. On September 20, 1956 Schering moved the district court to construe its final judgment of July 8, 1955 and to determine that Hexagon was not a qualified applicant for a license within the meaning of that judgment. On January 14, 1957 the district court entered an order declaring that Schering is required in good faith to negotiate for a license with Hexagon and to arbitrate any disputes over reasonable royalties pursuant to the agreement. 146 F. Supp. 106.[2]

"Meanwhile the arbitration demanded by Hexagon in September 1956 had been begun, the first hearing having

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[1] *i.e.*, Court of Appeals, Third Circuit.

[2] The opinion is dated Nov. 21, 1956.

been held on December 20, 1956. The proceedings terminated with an award by the arbitrators on February 25, 1958. The motions by Schering to confirm the award and by Hexagon to vacate it followed. On September 22, 1958 the district court entered an order denying the motion to confirm and granting the motion to vacate. 165 F. Supp. 295. Its action was based on its finding that one of the arbitrators was disqualified to act. From this order Schering appealed."

Hexagon moved in the Court of Appeals to docket and dismiss such appeal on the ground that the order appealed from is not a final or appealable order. The motion was denied.

REASONS FOR GRANTING THE WRIT

1. The Circuit Court held that an order vacating an arbitration award, thus requiring a new arbitration, is final and appealable.

The Circuit Court's holding.

The Circuit Court lays the groundwork for its decision in the following language (Appendix B, *infra*, pp. 4b, 5b):

> "The Stathatos case, upon which Hexagon chiefly relies, seems to be out of line with these authorities. For although it was a case brought solely to compel arbitration, the majority of the court relied upon the Schoenamsgruber and Pahlberg cases. Moreover, the authority of the case is certainly impaired if it is not completely overruled by the decision of the Supreme Court in the Goodall-Sanford case and the later decisions of the Court of Appeals for the Second Circuit which we have cited above. Certainly if an

> original order to arbitrate is final and appealable a later order in the same case vacating the award resulting from the original order to arbitrate and directing another arbitration such as was made in the Stathatos case should on principle be equally final and appealable."

The Circuit Court then discussed "the rationale of the cases" dealing with orders entered in arbitration matters. It stated that an order directing arbitration during the course of a law suit, is interlocutory and therefore not appealable, because in the normal course of events there will be a later final judgment in the action from which an appeal can be taken by the person aggrieved by the earlier order to arbitrate. It said further, however, that where the order to arbitrate will not, in the course of due procedure, be followed by another order of the court in order to carry the award into effect, the order to arbitrate is final; otherwise there can be no review thereof on appeal.

The Circuit Court then said: "The latter is the situation in the present case." It held that the order of the district court which vacated the arbitration award permitted the earlier order of January 14, 1957 (directing negotiation and arbitration) to continue to operate. Accordingly, the Circuit Court reasoned, if a second arbitration is held between the parties, at the conclusion thereof they need only "insert in the license agreement the amount of royalty rate fixed by the arbitrators and sign the agreement." The Circuit Court reasoned that the second award will not require a court decree to put it into effect, and therefore, unless Schering now has a right to appeal "in all probability" it will never be able to appeal the order

of September 22, 1958. The Circuit Court concluded its opinion with the statement that the order of January 14, 1957 to negotiate and arbitrate was not made in the course of a continuing suit which sought other relief and hence was appealable. It follows therefrom, said the Circuit Court, that the order of September 22, 1958 was also appealable.

2. The effect of the Circuit Court's holding.

The decision of the Court of Appeals was rendered *en banc* (seven judges and unanimous). Thus, there is lent to it a greater weight of authority than ordinarily. The most obvious effect of the decision is to encourage piecemeal appeals contrary to the congressional policy found by this court in *Parr* v. *United States*, 351 U. S. 513, 521, reh. den. 352 U. S. 859.

3. The holding of the Third Circuit conflicts with the holdings of the Second Circuit.

In *Stathatos* v. *Arnold Bernstein S.S. Corp.*, C. A. 2d, 1953, 202 F. 2d 525, that court had before it an appeal from an order setting aside an arbitration award and directing a resubmission to arbitration. It held that such order is similar to an order granting a new trial and accordingly is interlocutory and not appealable. The Second Circuit said (pp. 526, 527):

> "While the order now at bar is a vacation of a prior award, it is in essence one which continues the proceeding for arbitration, just as do the orders in the cases just cited."

The decision of the Third Circuit boldly suggests that the authority of the *Stathatos* case "is certainly impaired

if it is not completely overruled by the decision of the Supreme Court in the *Goodall-Sanford*[3] case and the later decisions of the Court of Appeals for the Second Circuit" which it cites in its opinion. An examination of the Second Circuit cases thus cited, namely, *Compania Panemena Maritima v. J. E. Hurley Lbr. Co.*, 1957, 244 F. 2d 286, and *Farr & Co. v. Cia. Intercontinental de Navegacion*, 1957, 243 F. 2d 342, makes it clear that the Second Circuit in the *Hurley* case quotes the *Stathatos* case with approval, and the *Farr* case analyzes and does not overrule it.

4. The holdings of the Second Circuit are correct and the Third Circuit is in error.

(a) The holding of the Third Circuit is based upon a misconception of the holding of this Court in the Goodall-Sanford case and an exercise in logic based upon a non sequitur.

In the *Goodall-Sanford* case this court specifically stated that it need not consider the *Pahlberg*[4] and *Schoenamsgruber*[5] cases in arriving at its decision. 353 U. S. 550, 551. Certainly, if this court intended to impair or overrule the authority of the *Stathatos* case, it would have said so. This court held only that if "arbitration is not merely a step in the judicial enforcement of a claim nor auxiliary to a main proceeding but the full relief sought, then the order directing such arbitration is final and appealable." 353 U. S. 550, 551. However, it does not follow from this, logically or otherwise, that if the order which directs the

[3] *Goodall-Sanford v. Textile Works*, 1957, 353 U. S. 550.
[4] *In re Pahlberg Petition*, 2 Cir., 1942, 131 F. 2d 968.
[5] *Schoenamsgruber v. Hamburg Line*, 1935, 294 U. S. 454.

arbitration is appealable, then the order which vacates the award (because one of the arbitrators was disqualified to act) flowing from such direction and which requires a new hearing, is also appealable.

In *Enelow* v. *New York Life Insurance Co.*, 293 U. S. 379, this court held that an order requiring that an equitable defense interposed in an action at law, be first tried to the judge as a chancellor, is appealable. If on such trial, the judge should grant judgment in favor of the defendant and the plaintiff should thereafter move for a new trial for good cause and an order be entered vacating the judgment and granting such new trial, no one would argue that because the order directing the trial to the judge as a chancellor was appealable, an order which vacated his judgment and directed a new trial was also appealable. There is nothing more well grounded in our appellate law, nor are the decisions in the various circuits of our courts of appeals more uniform than on the point that an order which vacates a judgment and grants a new trial is not appealable. *Gallon* v. *Lloyd-Thomas Co.*, 1959, 261 F. 2d 26.

This is the simple situation at bar. The award which was made by the board of arbitrators has been set aside by the district court. A new arbitration is to be held. In the language of the decision of the Second Circuit in the *Stathatos* case we find that the order is, in essence, one which continues the proceedings for arbitration just as do the orders in the cases vacating judgments and directing new trials.

(b) The logic in the opinion of the Third Circuit is based upon a false premise.

One basis for the opinion of the Third Circuit is its misconception of the order of the district court dated January 14, 1957. 146 F. Supp. 106.

On July 8, 1955 the district court entered its final decree in this action. By such decree it was adjudged that the Agreement between the Attorney General and the defendant, made as of January 1, 1952, is lawful and enforceable. One of the incidents of said final decree is that Schering is required to "negotiate in good faith with applicants for licenses * * * and to issue licenses to qualified applicants." The court retained jurisdiction to entertain further applications. 129 F. Supp. 879, D. N. J., 1955, aff'd 3 Cir., 1956, 228 F. 2d 624, cert. den. 1956, 351 U. S. 954.

On September 20, 1956 Schering moved the district court to construe its decree by advising of the meaning of the word "qualified" and to determine that Hexagon was not "qualified". 146 F. Supp. 106, 107.

Hexagon was not then a party to the action. 146 F. Supp. 106, 108. The motion was opposed by the plaintiff, Attorney General.

On November 21, 1956 the district court filed its opinion on such motion, holding that Hexagon is a qualified applicant and therefore Schering "is required to negotiate in good faith with (Hexagon) * * * for licenses * * * and to make offers to and to issue licenses to Hexagon." 146 F. Supp. 106, 109.

On January 14, 1957 the district court entered its order on Schering's motion to construe the word "qualified"

requiring Schering, *inter alia*, "to negotiate for a license with Hexagon and to arbitrate any disputes over reasonable royalties pursuant to the agreement." (Appendix B, p. 2b).

Neither Hexagon nor the plaintiff, Attorney General, at any time made a motion either in the pending action or pursuant to the United States Arbitration Act, 9 U. S. C., or any other arbitration act to compel arbitration. The order upon which the Court of Appeals relies is an order which was made in this action on the motion of Schering Corporation for an interpretation of the final decree already entered by the court.

The ultimate relief sought in the case at bar was not arbitration. The plaintiff, Attorney General, brought an action to enjoin the violation of the Agreement by the defendant, Schering, and for a declaratory judgment that the Agreement was valid.

The ultimate relief sought by the motion which resulted in the district court's order of January 14, 1957, was not arbitration. Schering's motion sought an interpretation of the final decree (which held the Agreement to be valid and required Schering to negotiate with and issue licenses to "qualified applicants") with respect to the words "qualified applicants".

At no time did anyone ask the district court of any other court, for an order, decree or judgment under which the ultimate relief sought was arbitration. Such relief flowed merely as an incident to the relief sought by the Attorney General in the main action and the interpretation of the judgment entered therein sought by Schering on its motion.

It would appear, therefore, that the Third Circuit has misinterpreted the decision of this court in the *Goodall-Sanford* case. This court clearly held in such case that it was only when arbitration is the full relief sought rather than merely a step in the judicial enforcement of a claim or auxiliary to the main proceedings, that the order directing such arbitration is final and appealable.

(c) The Third Circuit's error in assuming that unless Schering now has the right to appeal it may never be able to secure an appellate review of the order vacating the arbitration award also gave rise to its erroneous interpretation of the law.

Inherent in the Circuit Court's interpretation of the law was its mistaken conception of the right or ability of Schering to secure an appellate review of the order vacating the order of arbitrators.

In the present posture of the case, the parties and the Third Circuit are in agreement that Schering is required to carry out a second arbitration. If, as the Court of Appeals for the Third Circuit states, thereafter Schering is willing "to insert in the license agreement the amount of royalty rate fixed by the arbitrators and sign the agreement", then Schering is not aggrieved either by the award in the second arbitration or by the order from which it now seeks to appeal and which vacated the award flowing from the first arbitration. Accordingly, there need never be a judicial review of the order. On the other hand, if Schering is aggrieved by the award in the second arbitration it will *not* "insert in the license agreement the royalty rate fixed by the arbitrators and sign the agreement". The second

award then would "require judicial approval or a court decree to put it into effect." Schering would then be in a position to take an appeal from such order which would bring up for review the order from which it now seeks to appeal.

CONCLUSION

The issue in this case is whether piecemeal appeals will be permitted contrary to the congressional policy. The decision of the court below is the only reported case holding that an order of the district court which vacates the award of arbitrators and thus requires a second arbitation is a final and appealable order. This holding is in direct conflict with the holdings of the Second Circuit that such order is not final and is not appealable. The question is one which has not been, but which should be, settled by this court.

For the foregoing reasons, this petition for a writ of certiorari should be granted.

Respectfully submitted,

ALLAN L. TUMARKIN,
Attorney for Hexagon Laboratories, Inc., Intervenor,
9 Clinton Street,
Newark, New Jersey.

MONTROSE H. MASSLER,
THEODORE R. KUPFERMAN,
of Counsel.

APPENDIX A

Statutes Involved

28 U. S. C. 1291, as amended

Final decisions of district courts

The courts of appeals shall have jurisdiction of appeals from all final decisions of the district courts of the United States, the United States District Court for the District of the Canal Zone, the District Court of Guam, and the District Court of the Virgin Islands, except where a direct review may be had in the Supreme Court.

APPENDIX B

UNITED STATES COURT OF APPEALS

FOR THE THIRD CIRCUIT

WILLIAM P. ROGERS, ATTORNEY GENERAL OF THE UNITED STATES

v.

SCHERING CORPORATION,

Appellant.

ON MOTION TO DOCKET AND DISMISS APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF NEW JERSEY

Argued December 1, 1958

Before BIGGS, *Chief Judge*, and MARIS, GOODRICH, MCLAUGHLIN, KALODNER, STALEY and HASTIE, *Circuit Judges*.

OPINION OF THE COURT

(Filed January 8, 1959)

By MARIS, *Circuit Judge*.

Hexagon Laboratories, Inc., an intervenor in the district court, has moved to docket and dismiss an appeal taken by the defendant, Schering Corporation, from an order of the district court denying Schering's motion to confirm an award of arbitrators and granting the motion

of the intervenor to vacate the award. The background facts will be summarized briefly.

The stock of Schering, owned by German interests, was taken over by the Alien Property Custodian pursuant to the Trading with the Enemy Act. In 1952 the Schering stock was sold to the public, after an agreement had been entered into by the corporation with the Attorney General, as successor to the Alien Property Custodian, whereby, inter alia, it was agreed that certain patents owned by Schering were to be licensed by it to qualified applicants on a non-exclusive basis at a reasonable royalty to be arrived at by negotiation or, if negotiation failed, by arbitration under the rules of the American Arbitration Association.

An action was brought by the Attorney General as plaintiff to enjoin alleged violation of the agreement and for a declaratory judgment that the agreement was valid. The defendant, Schering Corporation, counterclaimed for rescission of the agreement. On July 8, 1955 the district court gave judgment for the plaintiff. 129 F. Supp. 879. The judgment was affirmed by this court on appeal. 228 F. 2d 624, cert. den. 351 U.S. 954.

On July 6, 1956 Hexagon applied to Schering for a license under Schering's Patent No. 2,567,245 to manufacture and sell an anti-histamine known as chlorprophenpyradimine maleate. The parties were unable to agree on the amount of royalty and on September 8, 1956 Hexagon demanded arbitration. On September 20, 1956 Schering moved the district court to construe its final judgment of July 8, 1955 and to determine that Hexagon was not a qualified applicant for a license within the meaning of that judgment. On January 14, 1957 the district court entered an order declaring that Schering is required in good faith to negotiate for a license with Hexagon and to arbitrate any disputes over reasonable royalties pursuant to the agreement. 146 F. Supp. 106.

Meanwhile the arbitration demanded by Hexagon in September 1956 had been begun, the first hearing having been held on December 20, 1956. The proceedings terminated with an award by the arbitrators on February 25, 1958. The motions by Schering to confirm the award and by Hexagon to vacate it followed. On September 22, 1958 the district court entered an order denying the motion to confirm and granting the motion to vacate. 165 F. Supp. 295. Its action was based on its finding that one of the arbitrators was disqualified to act. From this order Schering appealed. The motion to dismiss that appeal which is now before us raises the question whether the order appealed from has appealable finality.

In support of its motion Hexagon argues that the order vacating the arbitration award is essentially similar to an order granting a new trial in a civil action, since a new arbitration proceeding must follow under the agreement and prior order of the district court. It relies upon Stathatos v. Arnold Bernstein S.S. Corp., 2 Cir. 1953, 202 F. 2d 525, for this proposition. In that case the court held, one judge dissenting, that an order vacating a prior arbitration award and directing a resubmission to new arbitrators was but a step in a continuing process of arbitration and, therefore, lacked appealable finality.

We think that the present case is distinguishable from the Stathatos case in that here the court merely vacated the arbitrator's award and refrained in its order from directing a new arbitration although requested by Hexagon to do so. It is probably true, as Hexagon now argues, that such a direction was unnecessary in view of the fact that the court's order of January 14, 1957 directing Schering to arbitrate, if necessary to arrive at a royalty rate, remained in effect and was binding on Schering. It is upon this theory that Hexagon urges upon us our decision in United States v. Agne, 3 Cir. 1947, 161 F. 2d 331, as au-

thority in support of its motion. In that case we held that an order vacating a default decree which had been entered in favor of the Government in a suit to cancel a certificate of naturalization, was no more final than an order granting a new trial and was, therefore, not appealable. That, however, was a purely judicial proceeding and after the vacation of the default decree it still remained for the court to hear and determine the Government's request for the revocation of the defendant's citizenship.

It is settled that an order for arbitration is a final appealable decision where it is not merely a step in the judicial enforcement of a claim nor auxiliary to a main proceeding but is the full relief sought. Goodall-Sanford v. Textile Workers, 1957, 353 U.S. 550; Compania Panemena Maritima v. J. E. Hurley Lbr. Co., 2d Cir. 1957, 244 F. 2d 286; Farr & Co. v. Cia. Intercontinental de Navegacion, 2 Cir. 1957, 243 F. 2d 342; Continental Grain Co. v. Dant & Russell, 9 Cir. 1941, 118 F. 2d 967; In re Canadian Gulf Line, 2 Cir. 1938, 98 F. 2d 711. Such cases are to be distinguished from those in which an order for arbitration is made in the course of a continuing suit for other relief. Schoenamsgruber v. Hamburg Line, 1935, 294 U.S. 454, and In re Pahlberg Petition, 2 Cir. 1942, 131 F. 2d 968, were cases of the latter sort.

The Stathatos case, upon which Hexagon chiefly relies, seems to be out of line with these authorities. For although it was a case brought solely to compel arbitration, the majority of the court relied upon the Schoenamsgruber and Pahlberg cases. Moreover, the authority of the case is certainly impaired if it is not completely overruled by the decision of the Supreme Court in the Goodall-Sanford case and the later decisions of the Court of Appeals for the Second Circuit which we have cited above. Certainly if an original order to arbitrate is final and appealable a later order in the same case vacating the award resulting from

the original order to arbitrate and directing another arbitration such as was made in the Stathatos case should on principle be equally final and appealable.

It would appear that the underlying rationale of the cases, although not often expressed in these terms, is that an order directing arbitration is interlocutory and, therefore, not appealable if it is made in a lawsuit, such as a suit for damages, in which in the normal course of judicial procedure there will be a later final order or judgment from which an appeal can be taken by a person aggrieved by the prior order to arbitrate. If, however, the order to arbitrate will not in normal course of procedure be followed by another judicial order which will be required to carry the arbitration award into effect, the order to arbitrate must be regarded as final if the right to review it on appeal is to be given.

The latter is the situation in the present case. For the order of September 22, 1958 vacating the arbitration award merely opened the way for the continued operation of the prior order directing the parties to negotiate the royalty rate to be inserted in Schering's patent license to Hexagon and if necessary to arbitrate it. If the order of September 22, 1958 stands and the parties do carry out a second arbitration all that will remain to be done will be for them to insert in the license agreement the amount of the royalty rate fixed by the arbitrators and sign the agreement. Certainly the award will not require judicial approval or a court decree to put it into effect. Therefore, unless Schering now has a right to appeal from the order of September 22, 1958 it will in all probability never be able to secure an appellate review of that order.

The order made by the district court in this case on January 14, 1957 to negotiate and arbitrate was undoubtedly a final appealable order since it was not made in the course of a continuing suit which sought other relief.

It follows from what has been said that the order here appealed from was also a final appealable order even though its effect was to leave in force for future observance by the parties the prior order of the court directing arbitration.

The motion to dismiss the appeal will be denied.

A true Copy:

Teste:

Clerk of the United States Court of Appeals for the Third Circuit.

APPENDIX C

IN THE

UNITED STATES COURT OF APPEALS

THIRD CIRCUIT

No. 12,816

WILLIAM P. ROGERS, Attorney General of the United States

v.

SCHERING CORPORATION

Appellant

To:

United States Attorney
Federal Building
Newark, N. J.

Milton, McNulty & Augelli, Esqs.
Attorneys for Appellant
40 Journal Square
Jersey City 6, N. J.

SIRS:

PLEASE TAKE NOTICE, that the undersigned will bring the attached motion on for hearing before the United States Court of Appeals for the Third Circuit, at the Federal Courthouse, Market and Ninth Streets, City of Philadelphia, State of Pennsylvania, on the 17th day of November, 1958, at 10:30 A.M., or as soon thereafter as counsel can be heard.

Dated: Newark, New Jersey
November 6th, 1958

ALLAN L. TUMARKIN
Attorney for Hexagon Laboratories, Inc.
Intervenor-Appellee
9 Clinton Street
Newark, New Jersey

2c

IN THE

UNITED STATES COURT OF APPEALS

THIRD CIRCUIT

No. 12,816

WILLIAM P. ROGERS, Attorney General of the United States

v.

SCHERING CORPORATION

Appellant

MOTION TO DOCKET AND DISMISS APPEAL

Hexagon Laboratories, Inc., a New York Corporation (hereinafter "Hexagon"), Intervenor-Appellee, moves this Court to docket and dismiss the appeal herein with costs, on the ground that the judgment or order appealed from is not a final or appealable judgment or order.

ALLAN L. TUMARKIN
Attorney for Hexagon Laboratories, Inc.
Intervenor-Appellee
9 Clinton Street
Newark, New Jersey

APPENDIX D

UNITED STATES COURT OF APPEALS

FOR THE THIRD CIRCUIT

WILLIAM P. ROGERS, Attorney General of the United States, as Successor to the Alien Property Custodian

vs.

SCHERING CORPORATION, a corporation of the State of New Jersey,

Appellant

HEXAGON LABORATORIES, INC., a corporation of the State of New York,

Intervenor

Present: BIGGS, Chief Judge, and MARIS, GOODRICH, McLAUGHLIN, KALODNER, STALEY and HASTIE, Circuit Judges.

It is ORDERED that the motion to dismiss the appeal in the above-entitled case be, and it is hereby denied.

Attest: IDA O. CRESKOFF
Clerk

January 8, 1959